No. 73-1622

APR 29

MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM 1973

ST. LOUIS-SAN FRANCISCO RAILWAY CO.,

Petitioner,

vs.

ARMCO STEEL CORPORATION and PULLMAN, INCORPORATED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner St. Louis-San Francisco Railway Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

Opinion Below

The opinion of the United States District Court for the Eastern District of Missouri is reported at 359 F.Supp. 760 and is printed in the Appendix at pp. 11-17. The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 490 F.2d 367 and is printed in the Appendix at pp. 1-10.

Jurisdiction

The opinion of the United States Court of Appeals for the Eighth Circuit was filed on January 4, 1974. Rehearing was denied by that Court on February 6, 1974.

The jurisdiction of this Court is involved pursuant to 28 U.S.C. § 1254(1).

Question Presented

The question presented before this Court is whether a railroad occupying a position identical to that of almost all, if not all, other railroads in the United States is entitled to the protection of Section 402A of the Restatement of Torts (2nd) or whether the standard of care required of supplier-manufacturers to this railroad and hence, to all or substantially all railroads is limited by the specification of the American Association of Railroads.

Constitutional and Statutory Provisions Involved

Section 402A of the Restatement of Torts (Second) provides:

> §402 A. Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Statement of the Case

This case is a diversity action brought by the St. Louis-San Francisco Railway Company ("Frisco") against Armco Steel Corporation ("Armco") and Pullman, Incorporated ("Pullman") for $745,170.49 in damages suffered by Frisco arising out of the derailment of Frisco Train No. 37 at Chelsea, Oklahoma on December 19, 1969.

It is plaintiff's contention that the derailment of Frisco Train No. 37 at Chelsea, Oklahoma was caused by the failure of a 28" wrought steel railroad wheel manufactured and sold by Armco and installed on a railroad car by Pullman. Plaintiff's legal theory for recovery is founded upon Section 402A of the Restatement of Torts (Second) as expressly recognized under Missouri law. *Keener* v. *Dayton Electric Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969).

It is plaintiff's theory that the wheel failed through a fatigue mechanism caused by the concentration of stress at the location of twin scale pits on the plate surface of the wheel. These scale pits acted as stress raisers, concentrating stress at the location of the scale pits. The concentration of stress at these scale pits caused the stress on the wheel at those points to exceed the endurance limit of the wheel causing the wheel to fail. Had there been no stress raiser condition, the wheel would not have failed. Therefore, the wheel was unreasonably dangerous within the meaning of Section 402 A.

It is defendants' theory that the wheel was not unreasonably dangerous because it met the wheel specifications of the American Association of Railways (AAR). The American Association of Railroads is a voluntary association of railroads in the United States, Canada and Mexico. It deals with problems of mutual interest to railroads. Among other subjects, it adopts the specifications for equipment to which all railroads which interchange with other railroads must adhere.

The trial court did not decide the critical factual issue concerning the cause of the wheel failure. Rather, the trial court decided the case solely on the basis that the wheel met the AAR specifications and, therefore, as a matter of law, the wheel was not "unreasonably dangerous" within the meaning of Section 402A. The trial court said:

> "Within the concept of strict liability a defective condition is not one contemplated by the user which will be dangerous to him. By 'unreasonably dangerous' is meant that the product must be dangerous to an extent beyond that contemplated by those having the ordinary knowledge of the community as to the characteristics of the product. Railroads, including, of course, the plaintiff railroad, are the sole ultimate purchasers and users of railroad cars and wheels and the Court finds that Frisco fully contemplated all the characteristics of the wheel in question and that the wheel was neither defective nor unreasonably dangerous."

The trial court's reasoning may be summarized as follows:

1. A product is not unreasonably dangerous under Section 402A if the user contemplates the characteristics which makes it dangerous.

2. The railroad industry, including plaintiff, contemplate the characteristics of wheels manufactured in conformity with AAR specifications.

3. The failed wheel met AAR specifications and, therefore, its characteristics were contemplated by plaintiff.

4. The failed wheel was not unreasonably dangerous under Section 402A because plaintiff contemplated its characteristics.

The Court of Appeals adopted this reasoning and affirmed the trial court.

Reasons For Granting Certiorari

This case presents the question of what standard of care manufacturers of products sold to a railroad which is subject to the Interchange Rules of the American Association of Railroads must meet. The ruling of the Court of Appeals in rejecting the claim of Petitioner because the Association of American Railroads allegedly imposed a standard less rigid than that imposed by Section 402A of the Restatement, by inference deprives an important industry, that is railroads subject to the specifications of the American Association of Railroads, of the protection of that Section of the Restatement.

I.

The Decisions Below Will Have A Serious Adverse Effect On The Railroad Industry

The trial court concluded that since the failed wheel met AAR specifications, it was not unreasonably dangerous because the railroad industry including plaintiff contemplated all of the characteristics of the wheel. The trial court did not go beyond the question of whether the wheel met AAR specifications in determining whether the wheel was unreasonably dangerous.

It is quite clear that industry standards play a role in the adjudication of tort cases. However, the courts have long recognized that these standards are only one factor to consider in determining whether the standards of care established by law have been met. See *L. J. Hooper,* 60 F.2d 737, 740 (2nd Cir. 1932); *Schaffer* v. *Michigan Ohio Navigation Co.,* 416 F.2d 217, 222 (6th Cir. 1969). No case, prior to the Courts' decisions in this case, recognizes that compliance with industry standards is conclusive on the issue of tort liability.

The Court of Appeals states, in passing on this argument, that none of the cases cited by plaintiff was the finished product sold to users who participated in the design of the product. This analysis is not appropriate in a case under Section 402A. The focus in cases under Section 402A is on the quality of the product, not on the conduct of the plaintiff or defendant. Plaintiff admits that it is appropriate to consider industry standards as one factor in the analysis of whether the product is unreasonably dangerous. However, it is not proper to consider it as conclusive on the issue of the quality of the product merely because of the relationship of the plaintiff to the creation of the standard. The effect of the Court's ruling is that a product may be held unreasonably dangerous in a case involving one person but not unreasonably dangerous in a case involving another. This result is not proper under Section 402A. A product is either unreasonably dangerous or it is not. It does not matter who the plaintiff is. An industry standard is but one factor to be considered in ruling on the question of whether a product is unreasonably dangerous.

The trial court also concluded that in order for a product to be unreasonably dangerous the product must be dangerous to an extent beyond that contemplated by those of ordinary intelligence in the community which uses the product. In this case, the AAR Specifications of the American Railroads were held to be the characteristics contemplated by users of products in the industry. This was the sole criteria used by the trial court to adjudicate the issues in this case. A study of the entire record compels the conclusion that the Court of Appeals was in accord with this reasoning of the trial court and affirmed on that basis. The courts did not consider other policy factors in deciding this case. The doctrine of Strict Liability in Tort did not play the part which it should have in the Courts' determinations.

The United States District Court for the Eastern District of Pennsylvania in *Dorsey* v. *Yorder Co.*, 331 F. Supp. 753 (E.D. Pa. 1971) stated the law on this issue:

> "The proper test of 'unreasonable danger' is whether a reasonable manufacturer would continue to market his product in the same condition as he sold it to the plaintiff with knowledge of the potential dangerous consequences the trial just revealed." At 759-60.

The Court in *Yoder* concludes that the determination of the answer to this question is a balancing test. The Court states that the likelihood of harm which will result from the use of the product as manufactured and the gravity of the harm if it happens must be balanced against the burden of preventing the harm. See also 2 Harper & James, The Law of Torts § 28.4 (1956). If the balance favors the harm and gravity against the burden of presenting the harm, the product must be found unreasonably dangerous.

Professor Wade in an article on strict liability states the factors which should be considered in the balancing process. These factors are:

> "(1) the usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive." J. Wade, Strict Liability of Manufacturers, 19 S.W. L. J. 5 (1965).

The lower courts totally ignored these authorities and held, by implication, that the contemplation of danger is the sole criteria to be used to determine whether a product is unreasonably dangerous.

The effect of the opinions of the Courts below is to encourage a lower quality of products supplied to the railroad industry. It it clear that the railroad industry cannot agree to set quality standards for products, and agree to refuse to deal with those who fail to meet these standards without running into serious antitrust difficulty. See *Radiant Burners, Inc.* v. *Peoples Gas Light and Coke Co.*, 364 U.S. 656 (1961). Each railroad orders products from manufacturers based on its own judgment concerning quality. In this case, Frisco had in its possession a car owned by Trailer Train Corporation. This car was the cause of the derailment of Train No. 37. Frisco did not participate in the purchase of the car nor in the specifications for the quality of the wheel. It merely carried the car along its lines as a common carrier. By holding that Frisco is entitled to nothing more than the protection of the AAR specifications, the courts encourage wheel and car manufacturers to provide lower quality products. The result is a deterioration of service and safety on the American railroads.

Conclusion

For the reasons set forth above, petitioner prays that this Court grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit so that this case may be reviewed on the merits.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Submitted: November 14, 1973
Filed: January 4, 1974

Before VAN OOSTERHOUT, *Senior Circuit Judge,* and LAY and HEANEY, *Circuit Judges.*

HEANEY, *Circuit Judge.*

The St. Louis-San Francisco Railway Company appeals from a final judgment for the defendants in a product liability case in the United States District Court for the Eastern District of Missouri. The defendant, Pullman Incorporated, also appeals from the trial court's adverse ruling on its third-party action for attorneys' fees and expenses against Maryland Casualty Company.

On December 19, 1969, a Frisco train was derailed with a resulting loss to Frisco of $745,000. The derailment was caused by the failure of a wheel manufactured and sold by Armco Steel Company to Pullman in 1966. Pullman, in turn, mounted the wheel on a railroad car and sold the car to Trailer Train Company.[1] That corporation leased the car to various railroads, including Frisco.

Frisco brought a diversity action for damages against Armco and Pullman. It alleged that the wheel that caused

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[1] Trailer Train is a corporation which is owned by and leases railroad cars to a number of railroads. Frisco owns approximately two and one-half percent of Trailer Train's outstanding stock.

the derailment was a defective and unreasonably dangerous one. Pullman cross-claimed, seeking indemnity against Armco in the event judgment was entered against it. Pullman, in a third-party action, sought to be declared an insured under Armco's liability insurance policy issued by Maryland and, thus, that it was entitled to a defense by that company.

The case was tried to the court on the theory that Missouri law governed. The court held that Missouri had adopted the theory of strict liability in tort as set forth in the Restatement (Second) of Torts §402A (1965) in *Keener* v. *Dayton Electric Manufacturing Co.*, 445 S.W.2d 362 (Mo. 1969), and that Frisco was not entitled to recover under that theory because the wheel was not sold in a "defective condition unreasonably dangerous to the user or consumer * * *." It dismissed the indemnity cross-claim for mootness and held that Pullman could not recover its attorneys' fees and expenses under Armco's policy with Maryland because the policy excluded coverage to organizations otherwise covered who changed the form of the product or who performed installations in connection with the product.

The Frisco Claim for Damages.

The District Court found:

(1) The American Association of Railroads (AAR) establishes the specifications that railroad wheels must meet. These specifications are adopted by a vote of the members of the AAR, including Frisco.

(2) The wheel was manufactured in accordance with AAR specifications. It is normal for as-forged, hot-rolled wheels to develop scale pits on their surfaces during the

manufacturing process. The pits may be removed by grinding or shot peening. The pits increase the possibility of metal fatigue. The existence of fatigue cracks in railroad wheels is not unusual. A manual of the AAR requires that a wheel showing signs of metal fatigue be removed from service.

(3) The wheel was inspected before sale, at the Armco factory, for compliance with AAR specifications by Armco's inspectors and other inspectors employed by the Pennsylvania Railroad and working under contract for Trailer Train. It was found to meet the specifications.

(4) Pullman smooth-bored a preexisting hole in the center of the wheel and placed the wheel on the axle of the railroad car which was delivered to Trailer Train.

(5) The railroad car was used by various railroads throughout the United States from May 13, 1966, until its derailment on December 19, 1969. It was inspected at each interchange by the railroad receiving the car. The inspection of the car included an inspection of the wheels.

(6) The wheel and its mate were subjected to unusual stress.[2]

(7) The wheel failed as a result of metal fatigue.

(8) The metal fatigue occurred at the cracks in the wheel which were in the vicinity of two of the scale pits on the wheel.

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[2] The trial court does not appear to have placed much reliance on this finding in reaching its conclusions. We, therefore, do not rest our opinion on the fact that this finding is supported by the record.

(9) Frisco fully contemplated all of the characteristics of the wheel.

The court concluded:

> An essential requirement of a strict liability case is proof that the plaintiff was caused harm by reason of a product which when sold was in a defective condition unreasonably dangerous to the user or consumer as to his property. Within the concept of strict liability, a defective condition is one not contemplated by the user which will be dangerous to him. By "unreasonably dangerous" is meant that the product must be dangerous to an extent beyond that contemplated by those having the ordinary knowledge of the community as to the characteristics of the product. Railroads, including, of course, the plaintiff railroad, are the sole ultimate purchasers and users of railroad cars and wheels and the Court finds that Frisco fully contemplated all of the characteristics of the wheel in question and that the wheel was neither defective nor unreasonably dangerous.

Frisco argues on appeal that the trial court's finding that the wheel complied with AAR specifications was clearly erroneous. It contends, in the alternative, that the AAR standards were properly considered by the court in determining whether the wheel was unreasonably dangerous but should not have been determinative of that question. It contends that the court was required to go beyond the specifications and consider all of the evidence in determining whether the wheel was an unreasonably dangerous one; and that had the court done so, it would have found that the wheel was unreasonably dangerous as a matter of law.

The trial court's finding that the wheel complied with AAR specifications was not clearly erroneous. Indeed, it was supported by substantial evidence. Numerous wit-

nesses, including those responsible for the inspection program and independent experts, testified that the wheel was not excessively pitted and that it met the specifications in every respect. While there was expert testimony to the contrary, the trial court—as the fact-finder—had the right to reject the contrary testimony as not persuasive. *See, St. Louis Typographical Union No. 8* v. *Herald Company,* 402 F.2d 553, 557 (8th Cir. 1968).

We read the trial court's findings and conclusions more broadly than Frisco. It did not rest its judgment for the defendants solely on the ground that the wheel met AAR specifications. It concluded more generally that the wheel was not defective or unreasonably dangerous. This finding is consistent with the position taken in the RESTATEMENT (SECOND) OF TORTS §402A (1965) and is supported by the record.

The parties agree that §402A [3] correctly states the Missouri law of strict liability in tort. That section, *inter alia,*

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[3] §402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

requires that a product be "sold in a defective condition unreasonably dangerous to the user * * * or his property" in order for strict liability to apply. Comment *g* defines a "defective condition" as a "condition not contemplated by the ultimate consumer which will be unreasonably dangerous to him." *Id.* at 351. Comment *i*, in turn, provides that to be "unreasonably dangerous," "[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id.* at 352.

Frisco maintains that if the trial court ruled that the wheel was not defective or unreasonably dangerous, it did so solely because it assumed that there could never be proof of defectiveness or unreasonable danger where the alleged defect was contemplated by the ultimate user. They point out that this position has been rejected by the courts in Washington and California. *Palmer* v. *Massey-Ferguson, Inc.*, 476 P.2d 713 (Wash. App. 1970); *Pike* v. *Frank G. Hough Company*, 467 P.2d 229 (Cal. 1970). Those cases are clearly distinguishable from the instant case. The courts there were concerned with the "obviousness" of danger in finished products which had been sold to consumers who had not participated in designing the product. The California Supreme Court ruled in *Pike* that the trial court erred in nonsuiting the plaintiffs because the plaintiffs' evidence was sufficient to support a jury verdict in their favor. The Washington Court of Appeals held in *Palmer* (a negligence case) that the issue of the plaintiff's contributory negligence was for the jury to decide.

Frisco is not in the position of an unwary railway passenger. It is a company actively participating in the development of AAR specifications.

Moreover, we do not believe that the court operated under the suggested assumption. It was, however, convinced that the wheel was not defective or unreasonably dangerous. Railroad wheels do not last forever. Frisco's own employees testified that they were aware that wheels crack because of metal fatigue and for that reason, they regularly inspect the wheels and replace those found to be cracked. The evidence strongly supports the court's finding that the wheel was a normal one, and that it was not excessively pitted. Frisco had the burden of proving the wheel was defective and unreasonably dangerous. Under the circumstances present here, we do not believe the court erred in concluding that Frisco had failed to meet that burden.

Frisco is, in effect, urging this Court to go beyond the doctrine of strict liability and hold that Armco is an insurer and, thus, responsible in damages to a railway company whenever one of its wheels fails. We respond negatively to the urging.

Pullman's Third-Party Claim Against Maryland.

Pullman contends that it is covered by a liability insurance policy issued by Maryland to Armco and that it is entitled to recover attorneys' fees and expenses. Maryland concedes that Pullman may, under certain circumstances, be an insured "organization" under the policy, but argues that it is not covered here because of the following exclusions:

> 1. The insurance does not apply to any person or organization who:
>
> (a) Changes the form of such goods or products *out of which the accident arises;*
>
> • • •

> (c) performs any demonstration, installation, servicing or repair operations, *out of which the accident arises,* in connection with such goods or products away from the premises of such person or organization. (Emphasis added.)

The District Court's findings of fact on this point were sketchy. It found that:

> [1] Pullman smooth bored a hole in the wheel in question and installed it on a [railway] car. [2] The accident occurred away from the premises of the party claiming coverage.[4]

The court concluded that "[t]he amount of expenses and attorneys' fees incurred are excluded under the terms of the policy."

Apparently, the court felt that Pullman was barred from receiving fees and expenses incurred by it in defending the action because Pullman had enlarged a hole in the wheel and installed the wheel on a railroad car.

We disagree. Pullman is not barred from recovering its defense costs from Maryland unless the modification and installation performed by Pullman caused or contributed to the accident. There is no evidence that they did so. To hold to the contrary would render the phrase "out of which the accident arises" meaningless.

> It has been stated that a contract of insurance, being the law between the parties, should have every stipulation construed as written. It being presumed that every condition was intended to accomplish some purpose, it is not to be considered that idle provisions were

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[4] We need not discuss this second finding. It has no bearing on the resolution of the issues before us.

> inserted. Each word is deemed to have some meaning, and none should be assumed to be superfluous. All portions of a policy should be considered in construing it. Accordingly, a court will attempt to give meaning and effect, if possible, to every word and phrase in the contract in determining the meaning thereof.

13 J. APPLEMAN, INSURANCE LAW AND PRACTICE §7383 (1943)

It is reasonable to assume that the phrase "out of which the accident arises" within exclusion 1(c) means that when the accident arises out of the demonstration, installation, servicing or repair operation of the insurance organization, the insurance does not apply. If the accident does not arise out of those activities and if no other provision excludes coverage, the insurance does apply. Any other construction would be strained.

> The construction of an insurance policy should be a natural and reasonable one, fairly construed to effectuate its purpose, and viewed in the light of common sense so as not to bring about an absurd result. • • •

APPLEMAN, *supra*, §7386.

Maryland could have easily and clearly limited its liability in a manner consistent with the trial court's construction of the exclusion provisions if that was indeed its intention. It did not do so. Moreover,

> [i]t has been almost the unanimous holding of all courts that insurance contracts must be liberally construed in favor of a policyholder or beneficiary thereof, wherever possible, and strictly construed against the insurer in order to afford the protection which the insured was endeavoring to secure when he applied for the insurance. (Footnote omitted.)

APPLEMAN, *supra*, §7401.[5]

Maryland argues further that if the exclusions do not apply to Pullman, its policy is excess over an umbrella policy issued to Pullman by Lloyds of London and "is unenforceable by Pullman until Pullman exhausts Lloyds' obligation to Pullman." Because the trial court found that the exclusion provisions of the Maryland policy barred recovery, it has not had an opportunity to rule on this issue. We, therefore, remand to the District Court for consideration of this issue. On such remand, the District Court shall also determine, if necessary, whether the amount of attorneys' fees and expenses claimed by Pullman is appropriate.

Affirmed in part, reversed in part, and remanded for further consideration. Costs on appeal will be taxed two-thirds to Frisco and one-third to Maryland.

A true copy.
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[5] Apparently, the trial court and the parties do not believe that the choice of law is crucial to the resolution of the "insurance" issues. The court, in its findings of fact and conclusions of law, did not indicate what state's law applies and the parties have not raised the question on appeal. We, therefore, rely on what appears to be the law applicable in most states.

APPENDIX B

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE DISTRICT COURT

This case was tried to the Court and the Court makes the following findings of fact and conclusions of law with respect to the principal cause of action between the St. Louis-San Francisco Railway Company and defendants Armco Steel Corporation and Pullman Incorporated.

Findings of Fact

1. Plaintiff, St. Louis-San Francisco Railway Company hereinafter referred to as "Frisco", is a corporation organized under the laws of the State of Missouri, with its principal place of business in St. Louis, Missouri, and is engaged as a common carrier by railroads in the States of Missouri, Tennessee, Kansas, Oklahoma, Alabama, and Florida. Defendant Armco Steel Corporation, hereinafter called "Armco", is a corporation organized under the laws of the State of Ohio, with its principal place of business in Middletown, Ohio, and is authorized to do business within the State of Missouri. Defendant Pullman Incorporated is a corporation organized under the laws of the State of Delaware, having its principal place of business in Chicago, Illinois. It is authorized to do business in Missouri. Third-party defendant Maryland Casualty Company is a stock insurance company, organized under the laws of the State of Maryland, with its principal place of business outside the States of Missouri and Illinois, and is authorized to do business in the States of Missouri and Illinois.

2. Plaintiff Frisco seeks to recover damages for losses sustained to it when one of its trains derailed. Plaintiff alleges that the derailment was the result of a defective and unreasonably dangerous wheel which was manufactured by defendant Armco and installed by Pullman on a railroad car which was built and sold by Pullman to the plaintiff's lessor Trailer Train Company. Plaintiff's theory is strict liability in torts under section 402A, Restatement of Torts, Second. By cross-claim Pullman seeks indemity against Armco in the event judgment is entered against it and by third-party claim Pullman seeks to be declared an insured under Armco's liability policy of insurance issued by Maryland Casualty Company.

3. In May 1966, Pullman agreed to manufacture and Trailer Train agreed to purchase 156 railroad cars described as 89 foot lo dek flatcars. Trailer Train is a corporation, the stock of which is owned by railroads doing business in the United States, of which Frisco owns approximately two and one-half percent of the stock. Trailer Train leases railroad cars to the various railroads throughout the United States.

4. Armco manufactured the wheel in question. This wheel was made according to specifications of the American Association of Railroads, of which Frisco is a member. The wheel was inspected at the Armco factory by inspectors for the American Association of Railroads. The wheel in question was purchased by Pullman. A hole was drilled in the center of the wheel, which was placed on the axle of a railroad car, delivered to Trailer Train, and this car was used by various railroads throughout the United States. On December 18, 1969, the car in question was loaded with fifteen new Chrysler automobiles at Valley Park, Missouri, and on December 19, 1969, was involved in a derailment near Monnett, Missouri.

5. The car in question involved in the derailment was more or less in continuous service from May 1966 until the derailment in December 1969. The damage to plaintiff as a result of the derailment was $745,170.49.

6. The American Association of Railroads conducts continuous tests on various parts of railroad equipment, including railroad wheels and it sets the standards by which these wheels must be manufactured. Before a change can be made in specifications, it is necessary that all the railroads that are members approve these changes in specifications. Each railroad car, including the wheels, as it passes from one railroad to another at interchanges is inspected by the railroad receiving the car. In the manufacture of the particular wheel in question, there are scale pits on the surface of the wheel. This is a normal process for railroad wheels and it is also undisputed that scale pits may be removed by shot peening each wheel at an extra cost of approximately $1.00 per wheel. Scale pits increase the possibility of metal fatigue. Scale pits may also be removed by grinding the wheel, but such was not called for in the specifications. One of the disputed questions in this case is the cause of the wheel's failure. There is no question that metal fatigue caused the wheel to break down. The expert testimony was that the metal fatigue occurred at the cracks in the wheel which were in the vicinity of the scale pits. However, the mate wheel, that is the wheel on the other end of the axle, was also cracked, which would indicate some unusual stress on the wheel which broke and on its mate wheel.

7. In this case, Trailer Train by agreement with the Pennsylvania Railroad caused the wheel made by Armco and the car made by Pullman to be inspected at those respective plants by inspectors employed by Pennsylvania

Railroad. The evidence further shows that Armco's personnel inspected the wheel involved here and Armco, pursuant to Trailer Train's requirements, certified to Pullman that the wheel conformed to the American Association of Railroads specifications. While there is a dispute between the parties, the Court finds that the wheel in question did conform to the American Association of Railroads specifications.

8. The existence of fatigue cracks in railroad wheels is not unusual in the railroad industry and that is one of the reasons for inspections at interchanges. The manual of the American Association of Railroads requires that a wheel showing signs of fatigue cracks must be removed from service.

Conclusions of Law

1. This Court has jurisdiction by virtue of diversity of citizenship of the parties and the amount in controversy exceeds the sum of $10,000.00.

2. The Court is of the opinion that recovery in this cause must comply with the strict liability theory in Torts, section 402A, of Restatement of Torts, Second, which Missouri has adopted, *Keener* v. *Dayton Electric Manufacturing Co.*, 445 S.W.2d 362 (Mo. 1969).

3. An essential requirement of a strict liability case is proof that the plaintiff was caused harm by reason of a product which when sold was in a defective condition unreasonably dangerous to the user or consumer as to his property. Within the concept of strict liability, a defective condition is not one contemplated by the user which will be dangerous to him. By "unreasonably dangerous" is meant that the product must be dangerous to an extent beyond that contemplated by those having the ordinary

knowledge of the community as to the characteristics of the product. Railroads, including, of course, the plaintiff railroad, are the sole ultimate purchasers and users of railroad cars and wheels and the Court finds that Frisco fully contemplated all the characteristics of the wheel in question and that the wheel was neither defective nor unreasonably dangerous.

4. Judgment will be entered for both defendants and against the plaintiff. In view of this finding, Pullman has sustained no loss to Frisco and consequently on its cross-claim for indemnity against Armco, judgment will be entered for Armco and against Pullman.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO THIRD-PARTY CLAIM BY PULLMAN AGAINST MARYLAND CASUALTY COMPANY

Findings of Fact

1. At the time of the accident Pullman was insured for its liability under an umbrella policy issued by Lloyds of London. This policy provided that Lloyds was liable only for an amount in excess of $100,000.00. The policy further provided that if other valid and collectible insurance was available to the insured, the Lloyds policy should not contribute with such other insurance. The Lloyds policy further provided that the underwriters would not be required to assume charge of the defense of a lawsuit. Attorneys' fees and reasonable expenses incurred by Pullman totalled $30,989.01.

2. At the time of the accident Maryland Casualty Company insured Armco's liability in limits of $500,000.00. This policy contains the following provisions:

"B) With respect to the Products-Completed Operations Hazard, the unqualified word "insured" includes the named insured and any other person or organization with respect to the distribution or sale, in the course of business of such person or organization, of goods or products manufactured, sold, handled or distributed by the named insured, subject to the following provisions:

1. The insurance does not apply to any person or organization who:

   (a) Changes the form of such goods or products out of which the accident arises;

   (b) repacks such goods or products out of which the accident arises;

   (c) performs any demonstration, installation, servicing or repair operations, out of which the accident arises, in connection with such goods or products away from the premises of such person or organization.

2. The inclusion of more than one insured shall not operate to increase the limits of the company's liability."

"(h) *Products Hazard.* The term 'products hazard' means

(1) goods or products manufactured, sold, handled or distributed by the named insured or by others trading under his name, if the occurrence occurs after possession of such goods or products has been relinquished to others by the named insured or by others trading under his name and if such occurrence occurs away from premises owned, rented or controlled by the named insured, provided such goods or products shall be deemed to include any container thereof, other than a vehicle, but shall not include any vending machine, or any property, other than such container, rented to or located for use of others but not sold;

(2) operations, if the occurrence occurs after such operations have been completed or abandoned and occurs away from premises owned, rented or controlled by the named insured; provided operations shall not be deemed incomplete because improperly or defectively performed or because further operations may be required pursuant to an agreement; provided further, the following shall not be deemed to be 'operations' within the meaning of this paragraph":

3. Pullman bored a hole in the wheel in question and installed it on a car. The accident occurred away from the premises of the party claiming coverage.

Conclusions of Law

1. This Court has jurisdiction by virtue of pendant jurisdiction and by virtue of diversity of citizenship and the amount originally claimed exceeds $10,000.00.

2. The amount of expenses and attorneys' fees incurred are excluded under the terms of the policy.

3. Judgment will be entered for Maryland Casualty Company and against Pullman on its third-party claim.

Dated this 16th day of May, 1973.

/s/ *James H. Meredith*
United States District Judge

MAY 22 1974

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1622

ST. LOUIS-SAN FRANCISCO RAILWAY CO.,
Petitioner,

vs.

ARMCO STEEL CORPORATION and PULLMAN, INCORPORATED,
Respondents.

BRIEF

Of Respondent Armco Steel Corporation in Opposition to Petition for Writ of Certiorari

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1662

ST. LOUIS-SAN FRANCISCO RAILWAY CO.,
Petitioner,

vs.

ARMCO STEEL CORPORATION and PULLMAN, INCORPORATED,
Respondents.

BRIEF

Of Respondent Armco Steel Corporation in Opposition to Petition for Writ of Certiorari

OPINION BELOW

*In the report of the District Court's opinion, published in 359 F. Supp. 760, type-setting errors appear under "Findings of Fact," p. 761, paragraph 2, and under "Conclusions of Law" on p. 762, paragraphs 2 and 3.

The District Court's opinion, as printed in Appendix B to the petition filed in this court, omits changes made by the

* References, e.g. "(P6)" are to pages of the Petition; "(A6)" to Petitioner's Appendix; "(RA6)" to Respondent's Appendix.

court by amendment, pursuant to after-judgment suggestions and motion, to paragraph 4 of the Findings of Fact (A12), and to paragraphs 3 and 4 of the Conclusions of Law (A14, 15).

A copy of the part of the trial court's opinion relating to the claim of petitioner against Armco and Pullman and Pullman's Cross-claim against Armco, with the changes made by amendment italicized, appears as Appendix A to this brief.

JURISDICTION

Respondent contends that the petition supports none of the grounds suggested in Supreme Court Rule 19 for consideration in determining whether a writ of certiorari will issue, no ground of similar character, and no ground calling for the exercise of the court's discretion to issue the writ prayed.

QUESTION PRESENTED

The courts did not deny the protection of Section 402 A of the Restatement of Torts, Second, to the petitioner or to any railroad, as petitioner implies under the above caption, or rule that the standard of care required of supplier-manufacturers to petitioner or other railroads is limited by the American Association of Railroad's specifications. The judgment against petitioner is expressly based upon Section 402 A, and not upon the specifications of the A.A.R.

The question presented is whether petitioner, having based its claim solely upon Section 402 A of the Restatement of Torts, Second, should be granted the writ where, upon the facts and circumstances of the case, as found by both courts below, petitioner has failed to show any right to recover under the terms of the section it relies upon.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No constitutional or statutory provisions, or other matters referred to in Rule 23 (d) of this court, are involved in this case.

Under the above caption petitioner has set out the text of Section 402 A of the Restatement of Torts, Second, p. 347, but not the relevant comments thereunder. The latter appear in the Court of Appeals' opinion (A5-6), as follows:

> "That section requires that a product be 'sold in a defective condition unreasonably dangerous to the user * * * or his property' in order for strict liability to apply. Comment g defines a 'defective condition' as a 'condition not contemplated by the ultimate consumer which will be unreasonably dangerous to him.' Id. at 351. Comment i, in turn, provides that to be 'unreasonably dangerous,' '[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.' Id. at 352."

STATEMENT OF THE CASE

Petitioner's Statement, under the above-caption, (P2) does not adequately reflect the facts material to a consideration of the question presented. Paragraph 1 is a general description of the action and paragraph 2 a statement that petitioner's claim is based on Section 402A of the Restatement of Torts, Second. Paragraph 3 is a statement of petitioner's theory of the case.

Following is a statement of respondent's theory, (P4) which we cannot accept as a correct summary of respondent's position.

Respondent did not contend that the wheel was not unreasonably dangerous merely because it met AAR Specifications. Other evidence was adduced supporting respondent's contention that the wheel was not defective or unreasonably dangerous, and that petitioner fully contemplated all of its characteristics. The evidence strongly supported the trial court's finding that the wheel was a normal one, and that it was not excessively pitted. It is normal for as forged, hot-rolled wheels to develop scale pits on their surfaces during the manufacturing process. Petitioner's own employees testified that they were aware that wheels crack because of metal fatigue and for that reason they regularly inspect the wheels and replace those found to be cracked. (A7). The existence of fatigue cracks in railroad wheels is not unusual. The car was used by various railroads from May 13, 1966, until its derailment on December 19, 1969. It was inspected at each interchange by the receiving railroad. The inspections included an inspection of the wheels. (A3). The mate wheel, on the other end of the axle, was also cracked, which would indicate some unusual stress on the wheel which broke and its mate wheel, (A3, RA. 3).

The courts below concurred in finding the above to be the facts.

Finally, in its Statement of the Case, (P4) petitioner, in support of a contention that the trial court decided the case solely on the basis that the wheel met AAR Specifications, quotes a part of paragraph 3 of the court's Conclusions of Law (RA. 4), but omits the first sentence of the paragraph. When the entire paragraph is read, it becomes clear that petitioner's above contention is unfounded. The trial court, after stating in paragraph 2 of its Conclusions of Law that recovery in the case must comply with the theory of strict liability in torts said: (RA 4).

> "An essential requirement of a strict liability case is proof that the plaintiff was caused harm by reason of a

product which when sold was in a defective condition unreasonably dangerous to the user or consumer or to his property. Within the concept of strict liability, a defective condition is one not contemplated by the user which will be dangerous to him. By 'unreasonably dangerous' is meant that the product must be dangerous to an extent beyond that contemplated by those having the ordinary knowledge of the community as to the characteristics of the product. Railroads, including, of course, the plaintiff railroad, are the sole ultimate purchasers and users of railroad cars and wheels and the court finds that Frisco fully contemplated all of the characteristics of the wheel in question and that the wheel was neither defective nor unreasonably dangerous."

RESPONSE TO PETITIONER'S "REASONS FOR GRANTING CERTIORARI"

Under the above quoted caption (P6) petitioner asserts that the case presents the question, what standard of care the manufacturers of products sold to railroads must meet; that the Court of Appeals allegedly imposed a standard of care less rigid than that imposed by Section 402A, and thus deprived the railroads of the protection of said section. The alleged question, ruling of the court, and claimed result are substantially the same as petitioner raised in its Statement of the Case. In our response to Petitioner's Statement we have set forth the reasons why petitioner's said contention is unfounded. No purpose would be served by the repetition of our response at this point.

We agree generally with petitioner's contention (P6) that in tort litigation, industry standards are properly for consideration, but are not conclusive on the trier of the facts. Petitioner's implication that the courts below recognized industry standards as conclusive is not supported by the courts' opinions. They had the right to consider the AAR Specifications in connection with the issue with respect to petitioner's knowledge of the wheel's characteristics, and also in connection with Pullman's contingent cross-claim against Armco.

Petitioner argues (P7) that the focus under Section 402A is on the quality of the product and not on the plaintiff, and that the effect of the ruling below is that the same product may be held unreasonably dangerous to one person and not to another. We doubt that this proposition is embraced within the "Question Presented." However, petitioner elected to base its claim on Section 402A. The first paragraph of the section provides that one who sells any product in a defective condition unreasonably dangerous to the **user** or **consumer** is subject

to liability, etc. Comment g defines "defective condition" as a condition not contemplated by the ultimate consumer which will be unreasonably dangerous **to him.** Necessarily consumers will differ with respect to their knowledge of and experience with a product. If, as petitioner argues, this could result in a product being held unreasonably dangerous to one person and not to another, such would be result of the terms and definitions of the section in question. Whether a product is defective and unreasonably dangerous beyond the consumer's contemplation is a question of fact properly for the decision of the tryer of the facts. In the present case, the opinions below show that the courts considered all the facts and circumstances bearing on petitioner's knowledge of the product and contemplation of its characteristics. The problem petitioner suggests is not involved in this case and was not ruled upon below. We submit it provides no reason for the issuance of a Writ of Certiorari in this proceeding.

At the trial, petitioner based its case solely on Section 402A, of Torts 2d, of the Restatement. (A6, 12). The case was tried and determined below upon the theory that such section governed. Petitioner now (P8) seeks to substitute other theories of law and rules of decision in place of the terms and definitions of Section 402A. Whether the theory and rules now invoked should be followed in this case was not the subject of any ruling below. Respondent was not afforded any opportunity to offer evidence thereon. The tests and theories now brought forward by petitioner have not, to this date, been adopted by the American Law Institute as a part of its article on Torts, 2d.

The general rule governing judicial review, which confines the parties to the theory on which the case was tried below, is a just one, which we submit should be followed in this matter, and is a reason for not granting a writ on the basis suggested by petitioner.

Hynes v. Grimes Packing Co. (1949), 337 U.S. 86, 100, 93 L. Ed. 1231, 69 S. Ct. 968;
Adickes v. S. H. Kress & Co. (1970), 398 U.S. 144, 147 (footnote); 90 S. Ct. 1598, 26 L. Ed. 2d 142;
Lawn v. United States, 355 U.S. 339, 362 (footnote 6); 2 L. Ed. 321, 78 S. Ct. 311.

Petitioner argues (P9) that by holding that Petitioner is entitled to nothing more than the protection of the AAR Specifications, the courts below encouraged wheel and car manufacturers to provide the railroad industry with lower quality products. Our response is first, the courts below made no such ruling; second, the claim that the railroad industry, or any railroad individually, cannot obtain from its suppliers any improvements in its required products which it wants and is willing to pay for, is not plausible.

Petitioner denies participation in the wheel's specifications. (p. 9). The courts below found that the specifications were established by a vote of the AAR members, including petitioner, (A2), and that petitioner actively participated in the development of AAR specifications. (A6). This was but one of the factors considered in determining that petitioner fully contemplated all of the wheel's characteristics, and that the wheel was neither defective nor dangerous under the terms of Section 402A, Restatement of Torts Second. We have heretofore dealt fully with this matter. (p. 4-6, supra).

In regard to the findings of fact of a trial court, sitting as a jury, it has been the long established rule that the appellate courts will not interfere.

Zenith Radio Corporation v. Hazeltine Research, Inc., 395 U.S. 100, 123 [13], 23 L. Ed. 2d 129, 89 S. Ct. 1562.

The rule is particularly applicable in this case because the District Court and the Court of Appeals agreed in their findings. This court has held repeatedly, under the "two court rule," that it cannot undertake to review concurrent findings of fact by two

courts below, in the absence of a very obvious and exceptional showing of error. **Berenyi v. Immigration Service, 1967, 385 U.S. 380, 384 [1, 2] 87 S. Ct. 666, 17 L. Ed. 2d 656; Boehmer v. Pennsylvania R. Co., 1920, 252 U.S. 496, 498, 40 S. Ct. 409, 64 L. Ed. 680.**

The Supreme Court, on Certiorari, in diversity cases ordinarily adopts the determination of the Court of Appeals on local law, particularly where the same determination is made by the District Court.

> **Appalachian Power Co. v. American Institute of Certified Public Accountants, Per Mr. Justice Brennan. 1959, 4 L. Ed. 2d 30, 32 [4].**

Petitioner has had not only one day, but two days in court. It has failed to convince any of the judges who heard its claim below that it is entitled to recover under the evidence and the legal theory on which it bases its claim. It has failed to advance any valid reason why it should be granted a third hearing.

CONCLUSION

For the reasons stated above, respondent submits that the Writ prayed for by petitioner should be denied.

Respectfully submitted

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App. 1

APPENDIX

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE DISTRICT COURT

This case was tried to the Court and the Court makes the following findings of fact and conclusions of law with respect to the principal cause of action between the St. Louis-San Francisco Railway Company and defendants Armco Steel Corporation and Pullman Incorporated.

Findings of Fact

1. Plaintiff, St. Louis-San Francisco Railway Company hereinafter referred to as "Frisco", is a corporation organized under the laws of the State of Missouri, with its principal place of business in St. Louis, Missouri, and is engaged as a common carrier by railroads in the States of Missouri, Tennessee, Kansas, Oklahoma, Alabama, and Florida. Defendant Armco Steel Corporation, hereinafter called "Armco", is a corporation organized under the laws of the State of Ohio, with its principal place of business in Middletown, Ohio, and is authorized to do business within the State of Missouri. Defendant Pullman Incorporated is a corporation organized under the laws of the State of Delaware, having its principal place of business in Chicago, Illinois. It is authorized to do business in Missouri. Third-party defendant Maryland Casualty Company is a stock insurance company, organized under the laws of the State of Maryland, with its principal place of business outside the States of Missouri and Illinois, and is authorized to do business in the States of Missouri and Illinois.

App. 2

2. Plaintiff Frisco seeks to recover damages for losses sustained to it when one of its trains derailed. Plaintiff alleges that the derailment was the result of a defective and unreasonably dangerous wheel which was manufactured by defendant Armco and installed by Pullman on a railroad car which was built and sold by Pullman to the plaintiff's lessor Trailer Train Company. Plaintiff's theory is strict liability in torts under section 402A, Restatement of Torts, Second. By cross-claim Pullman seeks indemnity against Armco in the event judgment is entered against it and by third-party claim Pullman seeks to be declared an insured under Armco's liability policy of insurance issued by Maryland Casualty Company.

3. In May 1966, Pullman agreed to manufacture and Trailer Train agreed to purchase 156 railroad cars described as 89 foot lo dek flatcars. Trailer Train is a corporation, the stock of which is owned by railroads doing business in the United States, of which Frisco owns approximately two and one-half percent of the stock. Trailer Train leases railroad cars to the various railroads throughout the United States.

4. Armco manufactured the wheel in question. This wheel was made according to specifications of the American Association of Railroads, of which Frisco is a member. *The wheel was inspected at the Armco factory for compliance with AAR specifications by railroad inspectors employed by Pennsylvania Railroad and working under contract to Trailer Train Company.* The wheel in question was purchased by Pullman. A hole was drilled in the center of the wheel, which was placed on the axle of a railroad car, delivered to Trailer Train, and this car was used by various railroads throughout the United States. On December 18, 1969, the car in question was loaded with fifteen new Chrysler automobiles at Valley Park, Missouri, and on December 19, 1969, was involved in a derailment near *Chelsea, Oklahoma.*

5. The car in question involved in the derailment was more or less in continuous service from May 1966 until the derailment in December 1969. The damage to plaintiff as a result of the derailment was $745,170.49.

6. The American Association of Railroads conducts continuous tests on various parts of railroad equipment, including railroad wheels and it sets the standards by which these wheels must be manufactured. Before a change can be made in specifications, it is necessary that all the railroads that are members approve these changes in specifications. Each railroad car, including the wheels, as it passes from one railroad to another at interchanges is inspected by the railroad receiving the car. In the manufacture of the particular wheel in question, there are scale pits on the surface of the wheel. This is a normal process for railroad wheels and it is also undisputed that scale pits may be removed by shot peening each wheel at an extra cost of approximately $1.00 per wheel. Scale pits increase the possibility of metal fatigue. Scale pits may also be removed by grinding the wheel, but such was not called for in the specifications. One of the disputed questions in this case is the cause of the wheel's failure. There is no question that metal fatigue caused the wheel to break down. The expert testimony was that the metal fatigue occurred at the cracks in the wheel which were in the vicinity of the scale pits. However, the mate wheel, that is the wheel on the other end of the axle, was also cracked, which would indicate some unusual stress on the wheel which broke and on its mate wheel.

7. In this case, Trailer Train by agreement with the Pennsylvania Railroad caused the wheel made by Armco and the car made by Pullman to be inspected at those respective plants by inspectors employed by Pennsylvania Railroad. The evidence

further shows that Armco's personnel inspected the wheel involved here and Armco, pursuant to Trailer Train's requirements, certified to Pullman that the wheel conformed to the American Association of Railroads specifications. While there is a dispute between the parties, the Court finds that the wheel in question did conform to the American Association of Railroads specifications.

8. The existence of fatigue cracks in railroad wheels is not unusual in the railroad industry and that is one of the reasons for inspections at interchanges. The manual of the American Association of Railroads requires that a wheel showing signs of fatigue cracks must be removed from service.

Conclusions of Law

1. This Court has jurisdiction by virtue of diversity of citizenship of the parties and the amount in controversy exceeds the sum of $10,000.00.

2. The Court is of the opinion that recovery in this cause must comply with the strict liability theory in Torts, section 402A, of Restatement of Torts, Second, which Missouri has adopted, **Keener v. Dayton Electric Manufacturing Co.** 445 S.W.2d 362 (Mo. 1969).

3. An essential requirement of a strict liability case is proof that the plaintiff was caused harm by reason of a product which when sold was in a defective condition unreasonably dangerous to the user or consumer *or* to his property. Within the concept of strict liability, a defective condition is *one not* contemplated by the user which will be dangerous to him. By "unreasonably dangerous" is meant that the product must be dangerous to an extent beyond that contemplated by those having the ordinary knowledge of the community as to the

characteristics of the product. Railroads, including, of course, the plaintiff railroad, are the sole ultimate purchasers and users of railroad cars and wheels and the Court finds that Frisco fully contemplated all the characteristics of the wheel in question and that the wheel was neither defective nor unreasonably dangerous.

4. Judgment will be entered for both defendants and against the plaintiff. In view of this finding, Pullman has sustained no loss to Frisco and consequently on its cross-claim for indemnity against Armco, *the issues are moot and Pullman's cross-claim for indemnity will be dismissed.*